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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

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CONCETTA VILLAMORE,

Plaintiff,

-against-

WALDBAUM, INC., and THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., EDY'S GRAND ICE CREAM, DREYER'S GRAND ICE CREAM, INC. AND TOTAL FREEZE CORP.,

Defendants.

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TRIAL TERM PART: 45

INDEX NO.: 013850/07

MOTION DATE:11-23-09
SUBMIT DATE:1-4-10
SEQ. NUMBER - 004 & 005

The following papers have been read on this motion:

Notice of Motion, dated 10-16-09.....1
Affirmation in Opposition, dated 10-26-09.....2
Notice of Cross Motion, dated 11-3-09.....3
Affirmation in Partial Opposition, dated 12-1-09.....4
Affirmation in Opposition, dated 11-30-09.....5
Affirmation in Opposition, dated 12-11-09.....6
Affirmation in Reply, dated 12-17-09.....7
Reply Affirmation, dated 12-31-09.....8

Motion in a negligence action by defendants, The Great Atlantic and Pacific Tea Company, Inc. ("A&P") and Waldbaum, Inc. ("Waldbaum's") for an Order pursuant to CPLR §3212 granting summary judgment and dismissing the complaint of the plaintiff alleging injuries sustained after slipping and falling on water in supermarket; cross

motion by co-defendants, Edy's Grand Ice Cream ("Edy's") also s/h/a Dreyer's Grand Ice Cream ("Dreyer's") for an Order granting summary judgment pursuant to CPLR §3212 against co-defendant Total Freeze Corp ("Total Freeze") for contract indemnification; and cross motion by co-defendants, Edy's and Dreyer's for an Order granting judgment against defendant Total Freeze for breach of contract.

The defendants', A&P and Waldbaum's motion for summary judgment against the plaintiff is denied in its entirety; the defendants', Edy's and Dreyer's, motion for summary judgment against Total Freeze for contractual indemnification is granted; Edy's and Dreyer's cross motion against Total Freeze for an Order granting judgment for breach of contract for failing to name them as an insured under its liability policy is granted.

Waldbaum's, a supermarket and/or grocery store, is a wholly owned subsidiary of A&P and Total Freeze is an independent contractor hired by Edy's and Dreyer's, ice cream manufacturers, to merchandise their ice cream product in various food establishments.

On or about August 10, 2005, plaintiff entered the Waldbaum's supermarket in Commack, New York to purchase a birthday cake for a co worker. She alleges that she slipped and fell in the supermarket causing injury to her head and hand. The accident occurred near an open face or end cap freezer which contained Edy's Ice Cream. Plaintiff claimed that her clothes became wet and her subsequent examination of the area where she fell revealed "10 or 12 puddles of water" and a "bigger puddle by the freezer." (Villamor Tr. p.33) She also claimed to observe water leaking from the bottom of the freezer. The water was described as being colorless or clear.

The defendant witness for Waldbaum's, then Assistant Store Manager Keith Pape, testified that he examined the area after the accident and he observed several "droplets" of water of "various sizes" in the area where plaintiff fell. (Pape Tr. p. 19) It is undisputed that there was a water condition on the floor of that area; however, there is a dispute as to the source as the parties, through pre-trial depositions, speculated and/or claimed that it was caused by a leak from the freezers or water dripping from the packing and unpacking of the frozen food product.(See Villamor Tr. P. 46, Malen, Tr. p. 25 , Pape Tr p.15). The identity of the individual who was "pack[ing] out"the ice cream product on the date of the accident is also in dispute as the various pre-trial statements by the defendants indicate that it could have been a Waldbaum's, Edy's, or Total Freeze employee.

Mr. Pape deposed and stated that the person he saw "pack[ing] out" the ice cream was not a Waldbaum's employee but a "man" from possibly Edy's or Total Freeze. The transcripts of depositions from all defendants state that any one of the defendants could have "pack[ed] out" the freezer with the Edy's product depending on several factors; i.e,.whether the ice cream product was on sale, or whether the stock in the freezer was low.

Total Freeze, as Edy's and Dreyer's merchandiser, was responsible for maintaining and stocking the inventory at the various food retailers. It was responsible for dispatching Edy's' and Dreyer's' employees to the stores where they would stock the freezers with the ice cream product. Chris Malen, the Total Freeze sales representative at the time of the accident, was assigned to the sales territory that included the Commack Waldbaum's store.

Total Freeze's independent contractual agreement with Edy's and Dreyer's is set forth in a document entitled "Independent Broker Agreement"("Agreement") which contains an indemnification and hold harmless clause. The Agreement also provides that Total Freeze name Edy's and Dreyer's as additional insureds under its liability policy.(See Defendants', Edy's and Dreyer's Notice of Cross Motion, Exhibit F)

The bases for Atlantic and Pacific Tea Company and Waldbaum's motion for summary judgment is their lack of actual and/or constructive knowledge of the condition that caused the injury and that they did not create the hazardous condition that caused the injury. Co-defendants and plaintiff submitted opposition papers while defendants, Edy's and Dreyer's cross moved against Total Freeze for an Order granting summary judgment pursuant to the indemnification provisions of the Agreement and moved for an Order granting a judgment for breach of contract against Total Freeze as Total Freeze allegedly failed to name Edy's and Dreyer's as additional insureds under its liability as required the Agreement.

The standards for summary judgment are well settled. A Court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is; therefore, entitled to summary judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial. *Miller v. Journal-News*, 211 AD2d 626 (2nd Dept. 1995).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to

demonstrate the absence of material issue of fact. *Ayotte v. Gervasio*, 81 NY2d 1062 (1993). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of the opposing papers. *Alvarez v. Prospect Hospital*, 68 NY2d 320, *supra*; *Miceli v. Purex*, 84 AD2d 562 (2d Dept. 1981).

Once the this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form, sufficient to create material issues of fact requiring a trial. Mere conclusions and unsubstantiated allegations or assertions are insufficient (*Zuckerman v. City of New York*, 49 NY2d 557, 562[1980]) even if alleged by an expert. *Alvarez v. Prospect Hospital*, 68 NY2d 320 *supra*; *Aghabi v. Serbo*, 256 AD2d 287 (2nd Dept. 1998).

A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie case that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. (See *Sloane v. Costco Wholesale Corp.*, 49 AD3d 522 [2nd Dept. 2008], [Store owner did not create the condition which caused a patron's fall, or have actual or constructive notice of its existence for a sufficient length of time as no spills or other hazards were found when an employee conducted a walk-through inspection of the store just minutes before the accident occurred.])

In the instant action, it is not being alleged that defendants Waldbaum's and A&P created the unsafe condition which led to plaintiff's fall and resulting injury. Plaintiff apparently relies on actual or constructive notice as a basis for liability on a theory of a dangerous and unremedied condition that the defendants allowed to exist in the store.

In similar cases, defendants have been granted summary judgment where they have submitted evidence that the site of the injury had been inspected and/or cleaned prior to the accident or they have been able to establish a regular inspection or cleaning schedule of that area. In *Collins v. Mayfair Super Markets,13* AD3d 330 (2nd Dept 2004), the Court granted the defendant's motion for summary judgment where a plaintiff slipped and fell on waxy buildup on the floor of its supermarket. The defendant produced admissible evidence that its store managers inspected the area of the floor in question prior to the plaintiff's accident. See *Sherry v. Wal-Mart Stores East*, 67 AD3d 992 (2nd Dept 2009). However, the Court in *Gerbi v. Tri-Mac Enterprises of Stonybrook*, 34 AD3d 732, (2nd Dept. 2006), denied the defendant's motion for summary judgment in a slip and fall accident where it failed to submit evidence sufficient to demonstrate when the area of patron's accident was last inspected or cleaned prior to the incident(*id* at 732).

Waldbaum's has offered no evidence as to when the floor area was last inspected prior to the plaintiff's accident. *See Britto v. Great Atl. & Pac. Tea Co., Inc.*, 21 AD2d 436 (2d Dept. 2005). Although Mr. Pape answered in the negative when asked if he saw water in the disputed area prior to the accident, he made that observation while "walking past" the area when the unidentified "man" was in the process of stocking the ice cream in the freezer. (Pape Tr. p. 31) When asked for how long did he observe the "man", he replied " ...[o]nly a minute, if that". (Pape Tr. p. 31) Further, Mr. Pape stated that the "man" had "only just started" the packing out process. (Pape Tr. p. 25)

More importantly, Mr. Pape testified that there were no regular procedures and policies in place to inspect the freezer area after it had been "packed out" by vendors. (Pape Tr. p. 27.) He also testified that there would be a water condition created in the

course of the packing and loading of the ice cream product in the freezer. (Pape Tr. p. 43, 44). In fact, he stated that the vendor would be the one who would clean up the area after he/she completed the task; however, there was no known routine for Waldbaum 's' employees to inspect the area after the vendor left. Clearly, the packing out was just beginning when he observed the "man" on that date, and Mr. Pape was aware that a water condition often resulted from that activity. There is no testimony that he or any other employee went to check if the vendor cleaned up the area prior to the accident.

In analyzing the facts of the instant case under *Feldmus v. Ryan Food Corp.,* 29 AD3d 940 (2nd Dept. 2006) the defendants have not made their primae facie case. The Court in *Feldmus,* where the plaintiff sustained injuries after a slip and fall on a loaf of bread that fell from the store's shelves, denied summary judgment to the defendant even though it submitted evidence of a regular inspection procedure by the co managers. However, the testimony of its store manager revealed that vendors would "come in, pack out and go" without any checking by its employees. The Court stated; "...It cannot be said as a matter of law that this practice absolved the defendant of all responsibility for maintaining a safe premises..." *id* at 941; Also see *Britto v. Great Atl. & Pac. Tea Co.*, 21 AD2d 436 (2nd Dept 2005).

In light of the foregoing, this Court denies the defendants' motion for summary judgment. Since the defendants failed to meet their threshold burden, it is unnecessary to review the sufficiency of the plaintiff's and the other defendants' opposition papers. See *Britto v. Great Atl. & Pac. Tea Co.,* 21 AD2d 436 (2nd Dept 2005).

Regarding Edy's and Dreyer's motion for summary judgment for an Order granting indemnification pursuant to the clause of the Agreement, Total Freeze's defense is that it has not yet been determined as to whether Total Freeze was negligent. One must look to the language of the clause and the intent of the parties to decipher whether the issue of liability has to be determined to invoke its provisions. The relevant language states as follows:

> "...It is expressly understood and agreed that [Edy's] shall not be liable for and [Independent Broker] shall hold [Edy's] harmless from any obligations, claims, demands, losses, damages, suits, judgments, penalties, expenses or liabilities of any kind or nature, except claims related to manufacturing defects, arising directly or indirectly out of or in connection with this [Agreement], including but not limited to, any costs, expenses, court costs, and attorney fees incurred by [Edy's] by reasons of any defense to any claim or lawsuit to which [Edy's] has been named a party..." ARTICLE 8, HOLD HARMLESS, ¶8.1 (See Defendants' Edy's and Dreyer's Notice of Cross Motion, Exhibit F).

Implicit in Total Freeze's opposition, is the rationale that the law frowns upon contracts intended to exculpate parties from consequences of their own negligence; however the right to contractual indemnification depends on the specific language of the contract. *Niagra Frontier Transportation v. Tri-Delta Construction Corporation*, 107 AD2d 450 [4th Dept 1985] Generally, contracts will not be construed to indemnify a person against his own negligence unless such intention is expressed in clear unequivocal terms. If the indemnity clause does not contain explicit and express language referring to the negligence of the indemnitee, the intention to indemnify must be clearly implied from the language and purposes of the entire agreement and the surrounding facts and

circumstances. See *Niagra Frontier Transportation v. Tri-Delta Construction Corporation*, 107 AD2d 450 (4th Dept 1985), *supra*; *Sherry v. Wal-mart Stores East*, 67 AD3d 992 (2nd Dept 2009), *supra*. The language of the clause is clear and unambiguous as Total Freeze is to hold Edy's and Total Freeze harmless "...from any obligations, claims, demands, losses, damages, suits, judgments, penalties, expenses or liabilities of any kind or nature... arising directly or indirectly out of or in connection with this [Agreement]..." (See Defendants' Edy's and Dreyer's Notice of Cross Motion, Exhibit F). Therefore, Edy's and Dreyer's are not only entitled to indemnification even if they are found to be negligent; they are entitled to costs incurred in defending them as named parties.

Accordingly, Edy's and Dreyer's are entitled to indemnification in the instant matter and their motion for summary judgment is granted.

Regarding the breach of contract issue, Total Freeze does not raise any objection, defense or denial to Edy's and Dreyer 's claims regarding its failure to name them as insureds in its insurance policy. In fact, Total Freeze addresses the issue by only stating that the proper remedy for its alleged breach is "limited to out of pocket expenses for the failure to obtain insurance, namely the costs of 'maintaining and secur[ing]' the insurance policy for the year that included the date of the accident." (See Defendant Total Freeze's Affirmation in Opposition to Co-defendants, Motion and Cross Motion for summary judgment. ¶ 24).

This cross motion is unopposed and therefore granted in its entirety.

The defendants', A&P and Waldbaum's motion for summary judgment against the plaintiff is denied in its entirety; the defendants', Edy's and Dreyer's, motion for

summary judgment against Total Freeze for contractual indemnification is granted; Edy's and Dreyer's cross claim against Total Freeze for an Order granting judgment for breach of contract for failing to name them as an insured under its liability policy is granted. The amounts to be awarded as damages on the claims of indemnification and breach of contract shall be determined at trial.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: February 16, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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